Supreme Court, U.S.
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No. 89-106

In The

Supreme Court of the United States

October Term, 1988

DEXTER C. POSS, SR., Individually and as Administrator and Personal Representative of the Estate of DEXTER C. POSS, JR., Deceased, and MARY JO POSS, Individually,

Petitioners,

v.

KENNETH A. AZAR, M.D., WILLIAM B. SWAN, SHERIFF, COUNTY OF McDUFFIE, GEORGIA,

Respondents.

ON PETITION FOR A WRIT OR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY ARGUMENT

This petition presents the Supreme Court with an opportunity to address in the context of both a government hospital and a jail facility the burden of proof which is appropriate to demonstrate a constitutional deprivation *after* an individual with serious medical needs is involuntarily committed and incarcerated. Contrary to the contentions asserted in the respondents' briefs, this case has nothing to do with what a government official's duty might hypothetically be before an individual is deprived of his liberty.

In a case also from the Eleventh Circuit whose facts virtually mirror those of the instant action and whose holding squarely supports the position of the petitioners at bar, this Court implicitly recognized the distinction between the custodial and non-custodial obligations of government officials when it denied a writ of certiorari to the government petitioners in *Morrison v. Washington County, Alabama*, 700 F.2d 678 (11th Cir. 1983), *cert. denied*, 464 U.S. 864 (1983) [hereinafter cited as *Morrison*]. *Please see* petitioners' Petition For Writ Of Certiorari, p. 15.

The distinction recognized in *Morrison* was again implicitly confirmed by this Court when it denied a writ of certiorari to the individual petitioners in a case which, unlike the instant action, did not involve the loss of an individual's liberty — a deprivation which necessarily creates a special relationship and thereby triggers certain substantive constitutional rights. *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984) [hereinafter cited as *Jackson*]. It is noteworthy that in the dissent to the denial of certiorari in *Jackson*, Justice White and Chief Justice Rehnquist cited the *Morrison* decision

as a case whose holding when compared to the *Jackson* decision and others highlights *"the lack of definitive guidelines for determining when tortious conduct by state officials rises to the level of a constitutional tort* [emphasis provided]." *Jackson*, 465 U.S. at 1051. For that reason, and because " '[no] problem so perplexes the federal courts today as determining the outer bounds of § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983[,]' " Justice White and Chief Justice Rehnquist stated that "[t]his Court should attempt to resolve this 'perplexing' issue..." *Jackson*, 465 U.S. at 1050 and 1051, *quoting Jackson*, 715 F.2d at 1201.

Most recently, this Court has held that the "it is the State's affirmative act of restraining the individual's freedom to act on his own behalf — through incarceration, institutionalization, or other similar restraint of personal liberty — which is the 'deprivation of liberty' triggering the protections of the Due Process Clause..." *DeShaney v. Winnebago County Dept. of Social Services*, ___U.S.___, 109 S.Ct. 998, 1006 (1989). In the case at bar, the actions taken by the government respondents not only deprived the petitioners' decedent of his liberty, but their actions and representations also precluded treatment from being rendered by other medical facilities from whose care Cy Poss was taken or from being sought by Cy Poss's family elsewhere during the critical period following the initial suicide attempt. *"[T]he substantive component of the Fourteenth Amendment's Due Process Clause requires the state to provide involuntarily committed mental patients with such services as are necessary to insure their 'reasonable safety' from themselves and others* [emphasis provided]." *Id.* at 1005, *citing Youngberg v. Romero*, 457 U.S. 307 (1982).

In summary, for the same reasons cited by Justice White and Chief Justice Rehnquist in *Jackson*, and for the reasons discussed

more fully in the petitioners' earlier brief, the petitioners respectfully request that this Court grant the Petition For a Writ Of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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